No. 80-1294

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In the Supreme Court of the United States

OCTOBER TERM, 1980

HONEYWELL, INC., PETITIONER

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that a bidder under a procurement invitation by the Tennessee Valley Authority (TVA) lacks standing to challenge TVA's rejection of all bids for failure to meet specifications and its subsequent contracting with another party who met specifications and offered the lowest price.

2. Whether the determination of the TVA Board on the award of a TVA procurement contract is subject to judicial review.

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OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*)[1] is not reported. The decision of the district court (Pet. App. A)[2] was delivered orally in open court.

JURISDICTION

The judgment and opinion of the court of appeals were entered on November 3, 1980. The petition for a writ of

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[1] As reprinted in petitioner's appendix (Pet. App. B), part of the first paragraph of the opinion of the court of appeals has been omitted. Thus, we have reprinted the full opinion as an appendix here.

[2] In the decision of the district court, as reprinted in petitioner's appendix (Pet. App. A), the title "Memorandum" and the first paragraph following the title have been added, apparently by petitioner. The appendix also omits the final sentence of the original transcript, which states, "The motion to dismiss is granted."

certiorari was filed on February 2, 1981.[3] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The full text[4] of Section 9(b) of the TVA Act, 16 U.S.C. 831h(b), is set forth as Appendix B, *infra*.

STATEMENT

On February 3, 1978, TVA publicly advertised for bids on fire alarm systems for two nuclear generating plants that were under construction (Amended Complaint, para. 4). Bids were received from petitioner and from Pyrotronics, Inc. (Pet. 2-3). Petitioner's bid was lower than that submitted by Pyrotronics (*id.* at 3), but TVA determined that neither bid met specifications. Thus, both of the bids were rejected (Amended Complaint, para. 6).[5]

The fire alarm systems were urgently needed to avoid delays in construction schedules, and the TVA Board therefore authorized emergency purchase of the systems through negotiation under Section 9(b) of the TVA Act, 16 U.S.C. 831h(b). See 43 Fed. Reg. 52849 (1978). TVA then entered into negotiations with both petitioner and Pyrotronics. During these negotiations, TVA made clear to each of the bidders the deficiencies in the original bids, as well as the changes that would be necessary if their offered products were to be deemed acceptable (Amended Complaint, paras. 7-10). Both of the companies submitted new offers meeting these requirements (*id.* at para. 11). Pyrotronics' offer was the lower.

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[3]The petition was served on TVA on February 3, but the Solicitor General first received a copy on February 19.

[4]Petitioner has set forth in its appendix (Pet. App. C) only one paragraph of Section 9(b).

[5]Petitioner incorrectly states (Pet. 2) that its bid "took no exceptions to the specifications" and that it was the "successful low bidder" (Pet. 3). Petitioner's offer was "low" as to what it chose to offer, not as to what TVA sought.

Before a contract could be awarded to Pyrotronics, petitioner brought this action and obtained an ex parte temporary restraining order prohibiting the TVA Board from acting on the purchase. Petitioner contended that it was "the apparent low bidder" under the original invitation, that its bid had met the specifications under the invitation (despite TVA's determination that petitioner's bid failed to do so in six material respects), and that TVA's awarding of a negotiated contract to Pyrotronics would be "unlawful" under Section 9(b) of the TVA Act (Amended Complaint, paras. 5, 16 & 17). Petitioner asked that the court direct TVA to award it the contract or, alternatively, to award it damages.

TVA moved to dismiss on the ground that petitioner lacked standing under the TVA Act to challenge the proposed contract award. The district court thereafter vacated the temporary restraining order and granted the motion. The court of appeals affirmed.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. The petition should therefore be denied.

1. The court of appeals was correct in holding that bidders on government contracts lack standing to challenge contract awards in the absence of a statute or regulation within whose zone of protected interests they arguably fall, "especially as [this rule] pertains to the unique and independent role of the TVA" (App. A, *infra*, 2a).[6]

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[6]The decision below is consistent with previous decisions of the Sixth Circuit in this area. See *Cincinnati Elecs. Corp.* v. *Kleppe*, 509 F. 2d 1080 (1975); *GF Business Equip., Inc.* v. *TVA*, 430 F. Supp. 699 (E.D. Tenn. 1975), aff'd, 556 F. 2d 581 (1977). Contrary to petitioner's implication (Pet. 4-5 & n.1), the Sixth Circuit's opinions have not held that bidders categorically lack standing to challenge government contract awards. In fact, *Kleppe* expressly permitted such a challenge where a

In holding that the TVA Act provides no such protection, the court of appeals was clearly correct because, whatever may be the situation with respect to other government agencies, Section 9(b) of the TVA Act expressly authorizes TVA to award contracts to parties other than a low bidder:

> *Provided further*, That in comparing bids and in making awards the Board may consider such factors as relative quality and adaptability of supplies or services, the bidder's financial responsibility, skill, experience, record of integrity in dealing, ability to furnish repairs and maintenance services, the time of delivery or performance offered, and whether the bidder has complied with the specifications. * * *

The effect of this provision was considered in detail more than 40 years ago by a special joint congressional committee created by statute (52 Stat. 154) to review TVA's activities. The committee stated (S. Doc. No. 56, 76th Cong., 1st Sess. 117-118 (1939)):

> The Authority has * * * rejected low bids where superior products could be obtained at a slightly higher price * * *.
>
> * * * * *
>
> The * * * exceptions taken by the General Accounting Office to the Authority's purchases * * * on the ground that they violated the statute, are without foundation in law.

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particular statute—in that case, the Small Business Act—arguably protected the interest asserted by the complaining small business bidder. At all events, petitioner's argument that any plaintiff who pleads injury automatically has standing simply ignores the many decisions of this Court dealing with prudential limitations on standing. See, *e.g.*, *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979). Finally, petitioner's argument that the Administrative Procedure Act confers standing ignores both 5 U.S.C. 701(a) and this Court's decision in *Califano* v. *Sanders*, 430 U.S. 99 (1977).

In the face of this conclusion, Congress not only left intact the portion of Section 9(b) upon which the conclusion was based (and which is quoted above), but amended this section two years later by adding the following:

> *Provided*, That, subject only to the provisions of the Tennessee Valley Authority Act of 1933, as amended, the Corporation is authorized * * * to enter into such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it may deem necessary * * * and, notwithstanding the provisions of any other law governing the expenditure of public funds, the General Accounting Office * * * shall not disallow credit for, nor withhold funds because of, any expenditure which the Board shall determine to have been necessary to carry out the provisions of said Act. [7]

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[7] 55 Stat. 775-776, 16 U.S.C. 831h(b). On a number of occasions, Congress has since recognized the need of TVA, in light of its specialized program responsibilities, for more procurement flexibility than is required by government agencies generally. TVA has thus been accorded special exemptions from the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 474(12)), the Office of Federal Procurement Policy Act (41 U.S.C. 405(c)), and the Contract Disputes Act of 1978 (41 U.S.C. (Supp. III) 602(b), 607(b)(2), (g)(2), (h), (i)). The exemptions under the Contract Disputes Act of 1978 were included in a series of amendments offered on the Senate floor by Senator Byrd, the majority leader, who stated (124 Cong. Rec. S18640-S18641 (daily ed. Oct. 12, 1978)):

> The five amendments dealing with the Tennessee Valley Authority clarify the application of S. 3178 to the operation of the TVA. The purpose of these amendments is to maintain the status quo regarding the traditional flexibility and independence of the Tennessee Valley Authority * * *. It is recognized that the Tennessee Valley Authority has highly specialized purchasing needs and that it must have the freedom to exercise its business judgment in individual instances to be able to maintain the efficiency of its operations.

Thus, Section 9(b) expressly gives notice to low bidders on TVA contracts that they enjoy no protection against awards to higher bidders.

Here, petitioner is apparently objecting to TVA's rejection of all bids under the original invitation, based on the failure of those bids to meet specifications, and TVA's subsequent award (following negotiations) to the lower offeror. Rejection of all bids for failure to meet specifications, as well as for various other reasons, is a commonplace type of procurement action by government agencies, including those agencies which act under the Federal Procurement and Armed Services Procurement Regulations, which have considerably less procurement flexibility than does TVA. See 41 C.F.R. 2.404-1; 32 C.F.R. 2-404.1 (1979). And, as this Court has pointed out, no one has a right to a government contract. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940); *Reeves, Inc.* v. *Stake*, No. 79-677 (June 19, 1980).

Finally, it should be noted that petitioner did not even file this action until after it had participated in negotiations with TVA, submitted a new offer pursuant to the negotiations (which followed rejection of the original bids), and had learned that a better offer had been made by its competitor (Amended Complaint, paras. 11, 12 & 15).

2. Petitioner purports (Pet. I) to raise reviewability as a question presented here, but the petition does not discuss that issue. The courts below did not reach this question because of their decisions with respect to standing. At all events, we believe it is clear that the determinations of the TVA Board—that both bids failed to meet specifications, that both should be rejected, and that the contract should be awarded on the basis of negotiations with both bidders—are not judicially reviewable in light of the provisions of Section 9(b) of the TVA Act. See *Hi-Ridge Lumber Co.* v. *United States*, 443 F. 2d 452, 454-456 (9th Cir. 1971).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981

DOJ-1981-03

APPENDIX A

79-1156

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED

NOV 3, 1980

John P Hehman, Clerk

HONEYWELL, INC.,

Plaintiff-Appellant

V.

ORDER

TENNESSEE VALLEY AUTHORITY,

Defendant-Appellee

Before: WEICK and ENGEL, Circuit Judges and CECIL, Senior Circuit Judge

Plaintiff Honeywell, Incorporated, appeals from an order of the district court dissolving a temporary restraining order and dismissing its action for loss of profits and waste of bid preparation in connection with a bid which it submitted for the furnishing to the Tennessee Valley Authority of certain fire alarm systems for the Hartsville and Phipps Bend nuclear plants.

Honeywell's original bid, although the lowest, was rejected, purportedly for non-conformity with the specifications as advertised by the TVA. TVA did not re-advertise but, exercising its authority to declare an emergency (due to time limitations) under 16 U.S.C. § 831h(b)(1), it awarded the contract to a competitor who during negotiation had resubmitted a bid only slightly lower than Honeywell's. In

dismissing the action, United States District Judge Thomas A. Wiseman concluded that he was bound by the prior decisions of this circuit which, primarily on the authority of *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940), held that an unsuccessful bidder on a government contract does not have standing in a federal court to obtain relief when the contract is awarded to a competitor. *Cincinnati Electronics Corp.* v. *Kleppe*, 509 F. 2d 1080 (6th Cir. 1975); *GF Business Equipment* v. *TVA*, 430 F. Supp. 699 (E.D. Tenn. 1975), aff'd, 556 F. 2d 581 (6th Cir. 1977). See also *Inryco, Inc.* v. *TVA*, 471 F. Supp. 59 (E.D. Tenn. 1978). Appellant vigorously asserts that the standing requirements promulgated by the Supreme Court in *Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970), particularly its reference to the "zone of interest" test has been largely abandoned by later decisions of the Supreme Court and urged instead an application of what it defines as the fairly traceable causation test enunciated in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). *Duke Power*, appellant asserts, in turn recognizes the more expanded concept of standing set forth in *Scanwell Laboratories* v. *Shaffer*, 424 F. 2d 859 (D.C. Cir. 1970).

Although it has carefully considered these arguments, the court has not been persuaded that it should depart from its former and well established rule, especially as it pertains to the unique and independent role of the TVA. Accordingly,

IT IS ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

s/s John P. Hehman

Clerk

APPENDIX B

Section 9(b) of the TVA Act, 16 U.S.C. 831h(b)

All purchases and contracts for supplies or services, except for personal services, made by the Corporation, shall be made after advertising, in such manner and at such times sufficiently in advance of opening bids, as the Board shall determine to be adequate to insure notice and opportunity for competition: *Provided*, That advertisement shall not be required when, (1) an emergency requires immediate delivery of the supplies or performance of the services; or (2) repair parts, accessories, supplemental equipment, or services are required for supplies or services previously furnished or contracted for; or (3) the aggregate amount involved in any purchase of supplies or procurement of services does not exceed $10,000; in which cases such purchases of supplies or procurement of services may be made in the open market in the manner common among businessmen: *Provided further*, That in comparing bids and in making awards the Board may consider such factors as relative quality and adaptability of supplies or services, the bidder's financial responsibility, skill, experience, record of integrity in dealing, ability to furnish repairs and maintenance services, the time of delivery or performance offered, and whether the bidder has complied with the specifications.

The Comptroller General of the United States shall audit the transactions of the Corporation at such time as he shall determine, but not less frequently than once each governmental fiscal year, with personnel of his selection. In such connection he and his representatives shall have free and open access to all papers, books, records, files, accounts, plants, warehouses, offices, and all other things, property,

and places belonging to or under the control of or used or employed by the Corporation, and shall be afforded full facilities for counting all cash and verifying transactions with and balances in depositaries. He shall make report of each such audit in quadruplicate, one copy for the President of the United States, one for the chairman of the Board, one for public inspection at the principal office of the Corporation, and the other to be retained by him for the uses of the Congress: *Provided*, That such report shall not be made until the Corporation shall have had reasonable opportunity to examine the exceptions and criticisms of the Comptroller General or the General Accounting Office, to point out errors therein, explain or answer the same, and to file a statement which shall be submitted by the Comptroller General with his report. The expenses for each such audit shall be paid from any appropriation or appropriations for the General Accounting Office, and such part of such expenses as may be allocated to the cost of generating, transmitting, and distributing electric energy shall be reimbursed promptly by the Corporation as billed by the Comptroller General. Nothing in this chapter shall be construed to relieve the Treasurer or other accountable officers or employees of the Corporation from compliance with the provisions of existing law requiring the rendition of accounts for adjustment and settlement pursuant to section 71 of title 31, and accounts for all receipts and disbursements by or for the Corporation shall be rendered accordingly: *Provided*, That, subject only to the provisions of this chapter, the Corporation is authorized to make such expenditures and to enter into such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it may deem necessary, including the final settlement of all claims and litigation by or against the Corporation; and, notwithstanding the provisions of any other law governing the expenditure of public funds, the General Accounting Office, in the settlement of the

accounts of the Treasurer or other accountable officer or employee of the Corporation, shall not disallow credit for, nor withhold funds because of, any expenditure which the Board shall determine to have been necessary to carry out the provisions of said chapter.

The Corporation shall determine its own system of administrative accounts and the forms and contents of its contracts and other business documents except as otherwise provided in this chapter.